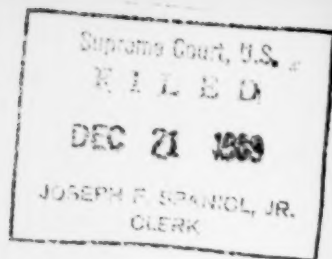


No. 89-834



IN THE
SUPREME COURT OF THE UNITED STATES
November Term, 1989

ALTON B. SMITH,

Petitioner,

versus

THE STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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Attorney General

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Should the ineffectiveness standard of Strickland v. Washington be the sole criteria for determining that a criminal defendant is procedurally barred from raising the constitutionality of his conviction on a Petition for Habeas Corpus when the defendant insisted that his appointed appellate counsel raise the issue on direct appeal but counsel refused to do so?

QUESTION RESTATED

Where a habeas petitioner fails to establish cause for a procedural default where competent appointed appellate counsel strategically chose not to raise a weak claim in favor of stronger claims, is habeas review on the merits of the weak claim allowed even though the mandates of Murray v. Carrier, 477 U.S. 478 (1986) are not satisfied?

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BRIEF IN OPPOSITION

The Respondent, State of South
Carolina, by and through the Attorney
General of South Carolina, hereby makes
its brief in opposition to the petition
for writ of certiorari requesting that
the petition be denied.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 882 F.2d 895, and is represented in the Petitioner's Appendix at C.1. The Order of the United States District Court for the District of South Carolina by the Honorable Clyde H. Hamilton, United States District Judge, is unreported and reprinted in Petitioner's Appendix, B.1. The memorandum opinion of the Supreme Court of South Carolina, State v. Alton B. Smith, 84-MO-120 (filed June 1, 1984) is unreported and reprinted in Petitioner's Appendix at A.1.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 2254, the Petitioner brought his action in the United States District Court for the District of South

Carolina. On December 16, 1988, the United States District Court denied the Petitioner's request for federal habeas relief from a South Carolina conviction and sentence.

On Petitioner's appeal to the United States Court of Appeals for the Fourth Circuit, the Court entered a judgment dated August 21, 1989 affirming the judgment of the District Court. The Petitioner invokes the jurisdiction of the Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states in its pertinent part "nor shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

This proceeding arises from a decision of the Honorable Clyde H. Hamilton, United States District Judge, denying a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and the Court of Appeals decision affirming the District Court. The Petitioner, Alton Smith, is an inmate serving imprisonment in the South Carolina Department of Corrections. He was indicted at the February, 1983, term of the Court of General Sessions for Lexington County, South Carolina, for the crimes of criminal conspiracy, criminal sexual conduct with a minor in the first degree, accessory before the fact of criminal sexual conduct with a minor in the first degree, criminal sexual conduct with a minor in the

second degree, accessory before the fact of criminal sexual conduct with a minor in the second degree and criminal sexual conduct with a minor in the second degree. The Petitioner proceeded to be tried by a jury of his peers and on February 16, 1983, he was found guilty of all charges. The Honorable Julius H. Baggett, Presiding Judge, sentenced the Petitioner to a term of imprisonment of five (5) years for conspiracy, thirty (30) years for criminal sexual conduct in the first degree, thirty (30) years for accessory before the fact of criminal sexual conduct in the first degree, twenty (20) years for criminal sexual conduct in the second degree, twenty (20) years for accessory before the fact of criminal sexual conduct in the second degree, and twenty (20) years for

criminal sexual conduct in the second degree, each sentence to run consecutively with the other.

The Petitioner appealed to the South Carolina Supreme Court. He was represented on appeal by William Isaac Diggs of the South Carolina Office of Appellate Defense. In his appeal, he briefed the following issues:

- I. Whether the court erred when it denied the Appellant's motion for a mistrial upon the State's election to proceed under S. C. Code Ann. §16-3-655, pursuant to Count 6 of the indictment, when the court had previously allowed into evidence testimony intended to support a violation of S. C. Code Ann. §16-3-653(1) pursuant to Count 6 of the indictment. This testimony was irrelevant, prejudicial and constituted evidence of a statutory offense which was not properly before the jury for its consideration. (Exception IV).

- II. Whether the court erred when

it refused the Appellant's motion for a mistrial when the court had allowed into evidence certain items taken as a result of a search and seizure of the Appellant's apartment, and then subsequently reversed its position and removed the items from evidence. This was error because the court ruled the foregoing items were recovered as a result of a Fourth Amendment violation, but were nevertheless placed before the jury during the course of the trial. (Exception V).

III. Whether the court erred and denied the Appellant Due Process of Law in violation of the Fourth and Fourteenth Amendment to the United States Constitution when it denied the Appellant's timely motion to suppress evidence recovered from the Appellant's apartment, when the foregoing constituted fruits of an illegal search and seizure conducted in violation of the Fourth Amendment to the United States Constitution? (Exception 1).

IV. Whether the court erred and abused its discretion when it refused the Appellant's timely request for instruction #6,

when the instruction is an accurate statement of the law and supported by the evidence of the case? (Exception VI).

After full briefing of these issues, the Supreme Court affirmed the conviction pursuant to Rule 23 finding no error of law present. State v. Alton B. Smith, Memo. Op. No. 84-MO-120 (June 1, 1984). A petition for certiorari was also denied in the United States Supreme Court on October 1, 1984.

On December 9, 1984, the Petitioner made an Application for Post Conviction Relief pursuant to S.C. CODE ANN. § 17-27-10, et seq., (1976). Respondent made its Return on June 12, 1985. On March 26, 1986, a hearing was convened. The Petitioner was represented by retained counsel, J. Dennis Bolt of Richland County. The Petitioner, Jean

Bergeron, and William Diggs testified.

In his Application, the Petitioner alleged that he was being held in custody unlawfully among other claims on the following grounds pertinent in this proceeding:

1. The Petitioner was unconstitutionally indicted and convicted under the criminal sexual conduct statute, South Carolina Code Sections 16-3-655(1) and 16-3-655(2); criminal sexual conduct with a minor in the first and second degrees.
2. Appellate counsel did not raise on appeal the trial court's refusal to grant the Petitioner's motion for severance.
3. Appellate counsel was ineffective that he did not raise on appeal the contention that, since there can be no violation of our State's criminal sexual conduct act in which a male is the victim and the female is the actor, then the Petitioner cannot be convicted on a theory of accomplice liability.

4. Appellate counsel was ineffective for not raising on appeal the issue that most of the indictments against Petitioner were too vague and broad and that trial counsel's motion to quash should have been granted.
5. Appellate counsel was ineffective because he did not present on appeal the issue of whether there was sufficient evidence to support Petitioner's conviction.

On May 13, 1986, the Honorable Hubert E. Long issued his Order of Dismissal. (J.A. pp. 89-91).

The Petitioner appealed to the South Carolina Supreme Court. On August 13, 1986, the Petitioner, through counsel, filed a State Post Conviction Relief Petition for Certiorari pursuant to State Court Rule 50(9). In his Petition, he raised the following pertinent questions:

1. Is the decision of the lower

court erroneous in denying Petitioner's application for post conviction relief on the ground that appellate counsel failed to present on appeal the trial court's denial of Petitioner's motion for severance?

2. Is the decision of the lower court erroneous in denying Petitioner's application for post conviction relief on the ground that appellate counsel failed to present the issue that the indictment under which Petitioner was tried was too vague and broad?
3. Is the decision of the lower court erroneous in denying Petitioner's application for post conviction relief on the ground that appellate counsel did not present on appeal the issue of the sufficiency of the evidence under which Petitioner was convicted?
4. Is the decision of the lower court erroneous in denying Petitioner's application for post conviction relief on the ground that appellate counsel did not present on appeal the assertion that Petitioner could not be convicted of criminal sexual conduct under the indictment and evidence.

5. Did the lower court's expressions of bias against the Petitioner preclude the lower court from rendering a fair and impartial decision?

The Respondent made its Return on September 15, 1986. On February 12, 1987, the Court issued its Order that the Petition for Certiorari was denied.

On December 11, 1987, the Petitioner filed a Petition for a Writ of Habeas Corpus. In the proceeding, he raised the following issues that are pertinent to this appeal.

Ground one: Petitioner's counsel at trial rendered ineffective assistance of counsel in that she failed to raise on direct appeal the issue of unconstitutional vagueness of S.C. CODE §16-3-655(1) and (2) as applied to this case, and under which Petitioner was convicted.

(J.A. p. 67). On May 23, 1988, the Honorable William M. Catoe, Jr., filed his Report and Recommendation on this

issue. (J.A. pp. 85-98). Particularly, he found that the state court finding that appellate counsel was competent was not binding but was supported by both substantial evidence and the applicable law. (J.A. p. 95). The Report stated that the statute was "clear in its meaning and that common sense would have dictated that an appeal [on the vagueness issue] would have been totally frivolous," rejecting the Petitioner's total reliance on the court's language in State v. Mathis, 287 S.C. 586, 340 S.E.2d 538 (1986). He noted that Mathis, supra, was concerned with an entirely different factual issue. (J.A. p. 95). After reviewing other issues, the Report concluded that "having found that the Petitioner's appellate counsel was competent, it must follow that the

Petitioner has failed to establish the cause and prejudice required by Wainwright v. Sykes, 433 U.S. 72 (1977)." (J.A. p. 98). The Petitioner timely objected to the Report. (J.A. pp. 99-101).

The District Court entered its Order on December 16, 1988, concluding that "the petitioner has failed to establish the ineffectiveness of his appellate counsel under the standards set forth in Strickland v. Washington" and granted the motion for summary judgment and dismissed the Petition for a Writ of Habeas Corpus. (J.A. pp. 103-119). The District Court agreed with the Federal Magistrate in the conclusion that Smith had failed to show sufficient "cause and prejudice" for his default in not raising the "vagueness"



issue in the direct appeal, particularly where he had not shown that his appellate counsel was ineffective. (J.A. p. 109). The Court concluded that counsel Diggs was "highly competent," discussed the alleged vagueness issue on several occasions, and chose to brief four other issues which in his professional judgment had a better chance of success. (J.A. pp. 111-112). The District Court stated that the Supreme Court of South Carolina upheld the conviction of the principle actor, Miriam Shull, in the direct appeal and determined that it revealed that the State Court's interpretation did not require intrusion of a male victim's body for a valid conviction of a female actor. (J.A. p. 113). The court concluded by determining that the state statute was clearly intended

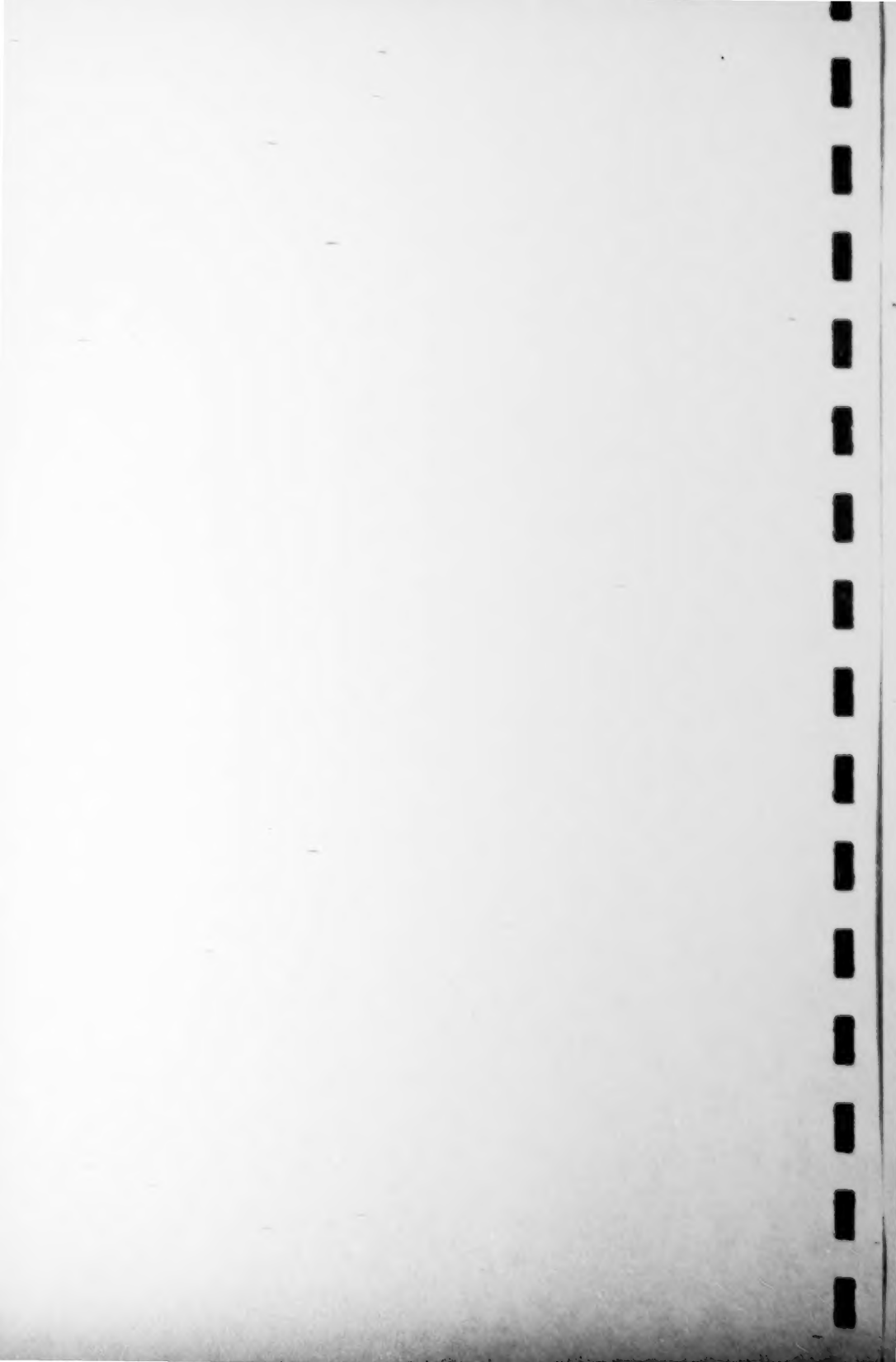
to apply to female actors and provided the necessary basis for Smith's conviction as a result of accomplice liability. (J.A. p. 114).

Smith appealed from the denial of habeas corpus relief to the United States Court of Appeals. On August 21, 1989, the panel issued its unanimous decision. Smith v. South Carolina, 882 F.2d 895 (4th Cir. 1989). The court concluded that the refusal of Smith's appellate counsel to raise a non-frivolous claim does not constitute cause for procedural default per se, but should be evaluated by the same standard for attorney error set forth in Murray v. Carrier, 477 U.S. 478 (1986). Smith, 882 F.2d at 897-898. The Court further held that Smith's appellate counsel's failure to raise a constitutional

challenge to the criminal sexual conduct statutory scheme did not amount to ineffective assistance of counsel, given counsel's reasonable conclusion that the challenge had a "marginal chance of success" and he strategically elected not to raise the vagueness claim in order to avoid diverting the appellate court's attention from what he felt were stronger claims. Smith, 882 F.2d at 898-899.

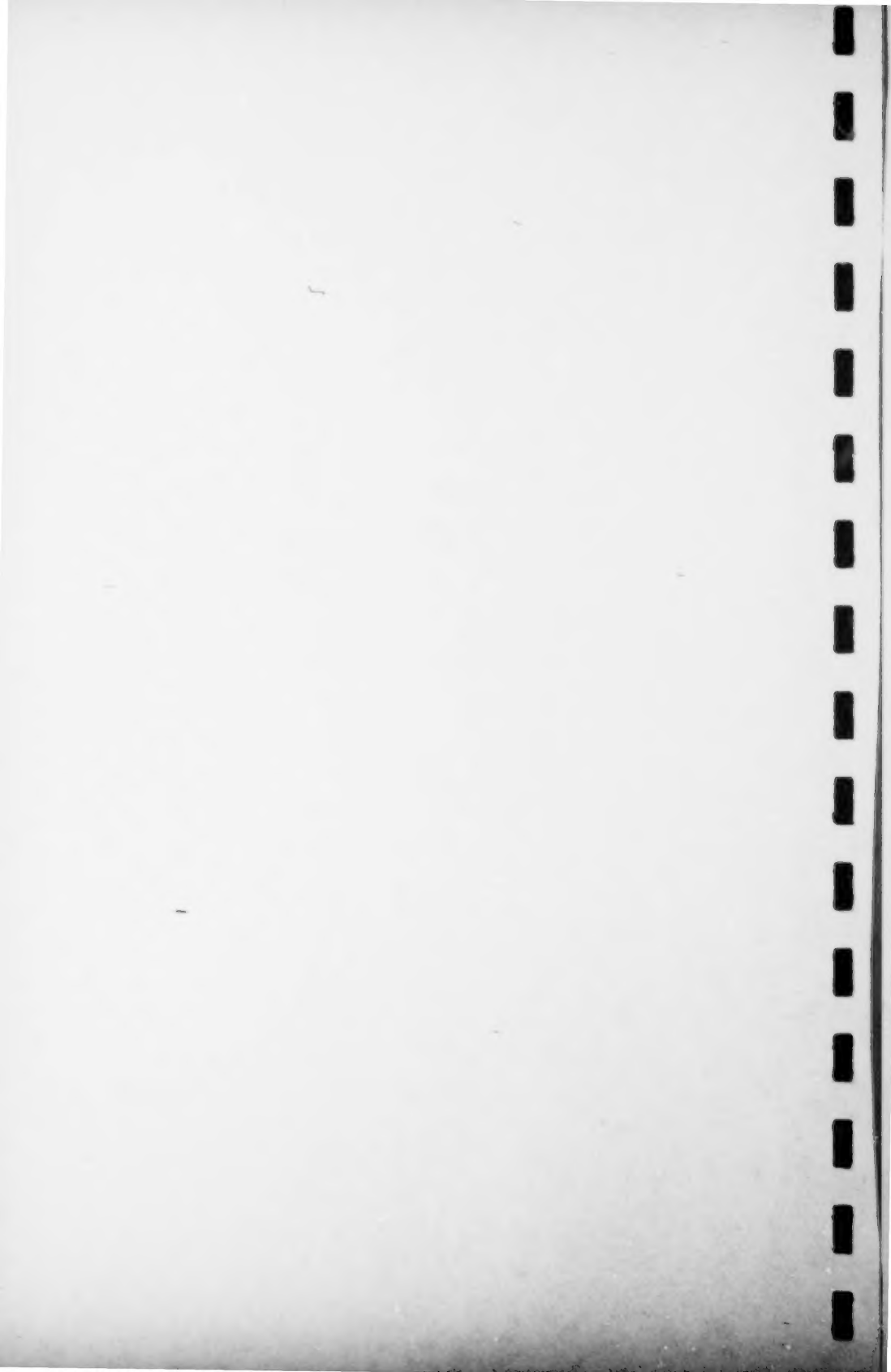
(a) Pertinent facts from the State Court proceedings.

The Petitioner, Alton Smith, and his co-defendant, Miriam Shull, were tried together before the Honorable Julius Baggett, Presiding Judge, for the various crimes involving unlawful criminal sexual conduct with a minor between December, 1979, through July 31,



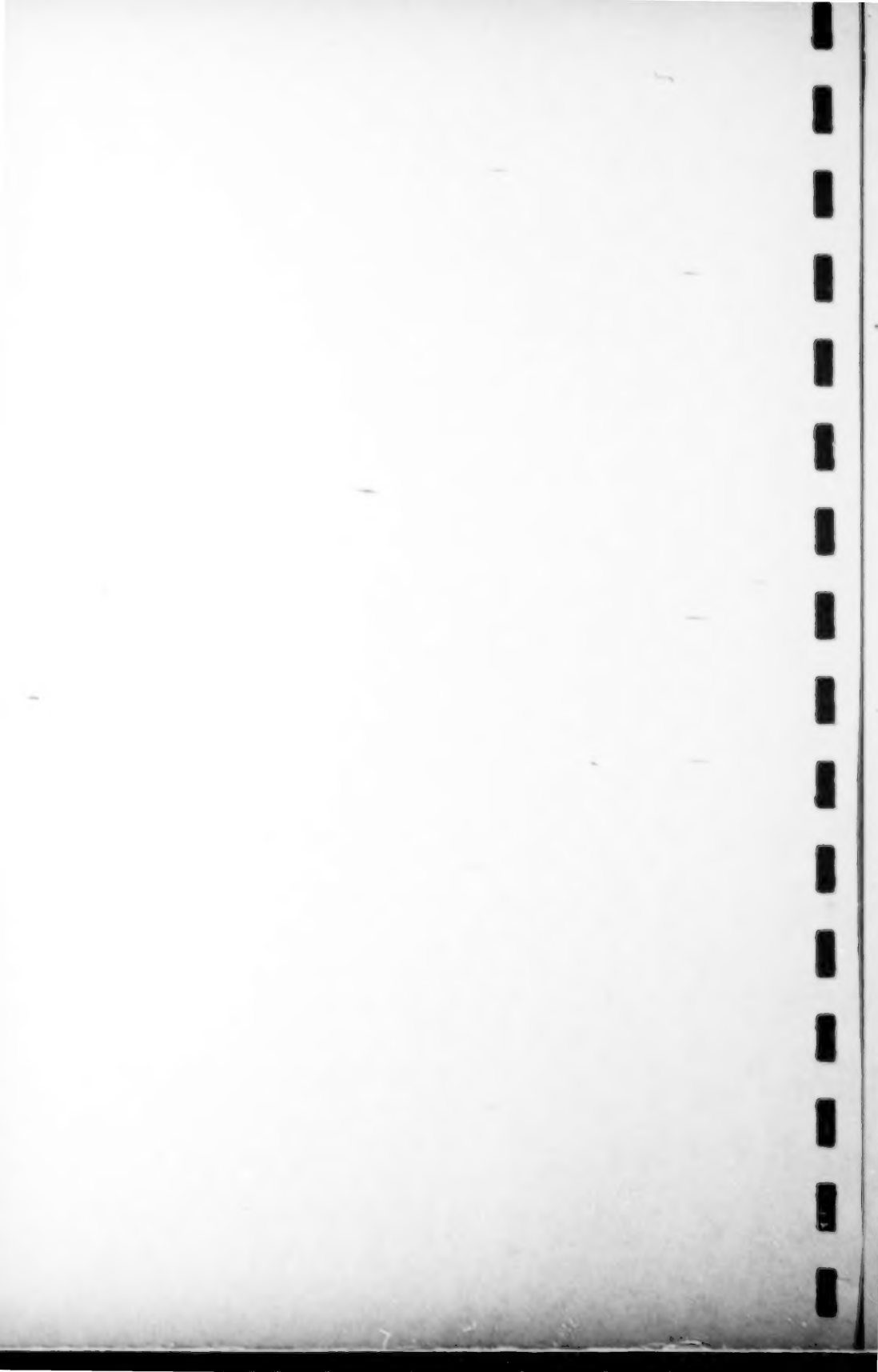
1982. The prosecution's case relied upon numerous exhibits presented including sexual devices, notes, photographs, and tapes of the sexual relations and particularly the testimony of Gary O'Neal Shull, the son of co-defendant Shull. The criminal incidents concerned the sexual relations between Mrs. Shull and her son and the role of Petitioner Smith.

The testimony revealed that Gary Shull was born June 26, 1970. Between June 1979, when Gary was nine years old and August 2, 1982, Gary's testimony revealed a history of sexual sessions which included vaginal, oral, and anal intercourse between the mother and son. (J.A. p. 22). The son's testimony revealed that the sex sessions occurred at the direction of Alton Smith through



his suggestions and providing sex manuals they were supposed to study. (J.A. pp. 18-19). It also occurred as a result of physical threats by the Petitioner to the young boy. (J.A. pp. 36-39). During his testimony, he stated there were over one hundred of the sex sessions. (J.A. p. 17). Gary further testified about Smith's role as controlling the situation and taking photographs of the sessions with his mother. Gary testified that Smith never had personal sexual contact with him.

The Petitioner, after being convicted of the charges, filed an appeal to the South Carolina Supreme Court. His appellate counsel, William I. Diggs, raised four issues in his brief to the Court. Counsel did not raise an issue concerning whether the criminal sexual



conduct statute in South Carolina would apply to a female "actor" and male "victim" and allow for accomplice liability. During the state post conviction relief hearing, counsel Diggs testified that he had conversations with his client about the issue being raised and he "felt that there was absolutely no merit in that. I felt then and I do now simply because you can commit sexual battery simply by engaging in sexual intercourse. There was no requirement that the victim be penetrated ...".

(J.A. p. 5A0. He further testified that he did not want to raise an issue like that on appeal especially where he felt there were other more meritorious issues in the case. (App. P. pp. 134-136).

REASONS WHY CERTIORARI SHOULD BE DENIED

1. The decision of this Court in



Murray v. Carrier, 477 U.S. 478 (1986) is binding and resolves the issue in Respondent's favor.

In Murray v. Carrier, 477 U.S. 478 (1986), this Court addressed the ability in federal habeas corpus to review the merits of a constitutional claim where there was a state procedural bar by not raising the matter in the direct appeal from the conviction. The Court stated:

We hold that counsel's failure to raise a particular claim or claims on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by the state courts. Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when the default occurs on appeal rather than at trial. To the contrary, cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim.

477 U.S. at 492. Further, the court

stated "so long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, supra, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." Id. at 488. However, it stated ineffective assistance of counsel is "cause" for a procedural default.

In Jones v. Barnes, 463 U.S. 745, 754, n. 7 (1983), the Court stated, three years before Murray, that "we have no occasion to decide whether counsel's refusal to raise the requested claims would constitute 'cause' for a petitioner default with the meaning of Wainwright v. Sykes, [433 U.S. 72, 87

(1977)]]." In this case, the Petitioner asserts that he is presenting the issue yet unaddressed from Jones. Contrary to his position, the Fourth Circuit concluded that this Court's decision in Murray addressed the question of "attorney error" in failing to raise an issue on appeal and the standards required to show "cause" under those circumstances.

This Court clearly stated "attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when the default occurs on appeal rather than at trial." Murray, 477 U.S. at 492. "So long as a defendant is represented by counsel whose performance is not constitutionally effective under [Strickland v. Washington, 466 U.S. 668 (1984)] we discern no inequity in requiring him to

bear the risk of attorney error that results in a procedural default."

Murray, 477 U.S. at 488.

In his Petition, the Petitioner contends that if the opinion below stands, a "criminal defendant will be forever procedurally barred from raising a non-frivolous issue that he adamantly wants raised because counsel refused to present the issue." (Petition, p. 11). Such a conclusion is overstated. If the criminal defendant is able to show that counsel was not performing competently as required under the Sixth Amendment, he will be able to raise the issue. While Respondents submit that such an absolute bar is appropriate in federal habeas, Fay v. Noia, 372 U.S. 391 (1963), this Court choose in Murray, supra, to continue to proceed down a

different path begun with Wainwright. To take the position that the Petitioner asserted in the lower court and this Court of an automatic conclusion of "cause" where the criminal defendant was not personally in agreement with counsel's decision would gut the reasonable foundation of Wainwright and Murray and open the floodgates of habeas litigation by inmates claiming non-acquiescence in a myriad of decisions by competent counsel performing as demanded by the Sixth Amendment. Such a conclusion is not demanded by either the Constitution or the facts in this case.

The Fourth Circuit held that appellate counsel, William I. Diggs, was competent under the standards of Strickland v. Washington, 466 U.S. 668 (1984), in his performance in the appeal. Smith

v. South Carolina, 882 F.2d at 898-899. Particularly, the District Court held that his decision not to raise the vagueness argument concerning the applicability of the criminal sexual conduct statute to him could not be said to be "outside the wide range of professionally competent assistance" where "counsel's strategic choice to raise four more promising issues on appeal, after thorough investigation of the law and facts relevant to petitioner's case, is typically considered good appellate practice." (J.A. p. 112). The Petitioner contends that these conclusions were error because appellate counsel refused to raise the central nonfrivolous issue Petitioner sought to have adjudicated. He contends the Circuit Court's analysis of Murray v. Carrier,

477 U.S. 478 (1986), should not be applicable to a situation where the client asks appellate counsel to raise the issue. We submit that the lower courts properly applied federal constitutional law to the facts of this case in its determination that appellate counsel performed competently.

A. Ineffective assistance of appellate counsel.

The Sixth Amendment guarantee of the effective assistance of counsel has been held to extend to effective appellate counsel as well as trial counsel. Evitts v. Lucey, 469 U.S. 387 (1985). The court in Evitts did not set out specific criteria for assessing the effectiveness of an attorney on appeal, but the lower courts, as well as other circuit courts, have applied the

standard for the ineffective assistance claims in habeas proceedings established in Strickland v. Washington, 466 U.S. 668, 687 (1984). The Supreme Court, however, also has held in Jones v. Barnes, 463 U.S. 745 (1983), that appellate counsel has no constitutional duty to raise every non-frivolous issue on appeal, if counsel, as a matter of professional judgment, decides not to raise such issue on appeal. Id. 751-754. The Barnes court reasoned that counsel must be allowed to exercise his reasonable professional judgment in selecting those issues most promising for review and, in this respect, specifically stated that "a brief that raises every colorable issue runs the risks of burying good arguments" Id. 752-753. Griffin v. Aiken, 775 F.2d

1226 (4th Cir. 1985). Accord Wicker v. McCotter, 783 F.2d 487 (5th Cir. 1986); Hamilton v. McCotter, 772 F.2d 171 (5th Cir. 1986); Paradis v. Arave, 667 F.Supp. 1361 (D. Idaho 1987); U.S. ex rel. Bradley v. Lane, 834 F.2d 645 (7th Cir. 1987). See also Burger v. Kemp, U.S., 107 S.Ct. 3114 (1987) (appellate counsel decision not to raise issue in brief was sound strategy).

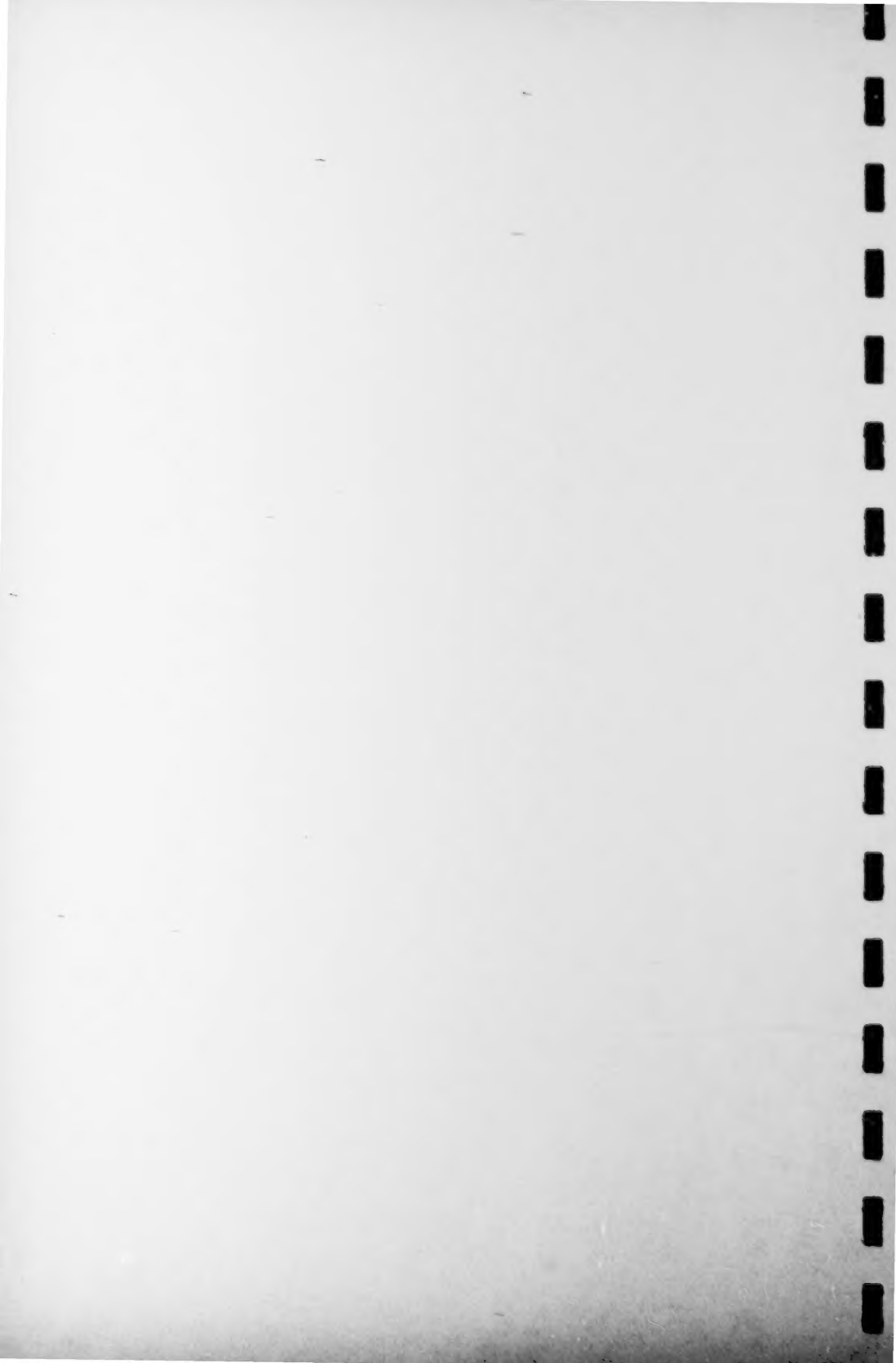
The Strickland standard requires two findings. First, that counsel's performance was deficient, and second, that the deficiency resulted in prejudice to the defense. For effective assistance analysis, the issue in the performance prong is not whether an issue existed that was nonfrivolous, but counsel's actual performance. Under Jones, the Court has already held there

is no Sixth Amendment violation where appellate counsel fails to raise every nonfrivolous issue requested by the client. "This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986). As Jones stated, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Jones v. Barnes, supra, 463 U.S. at 754.

B. Counsel's competent performance.

The record before this Court leads

to one inevitable conclusion--appellate counsel performed "reasonably competent" in the preparation and handling of the appeal. Appellate counsel Diggs testified that he had been an attorney since 1980 and with the South Carolina Office of Appellate Defense since 1981. He testified that prior to the filing of his Brief, he met with the Petitioner "two to three times." (Appendix to Petition, p. 129, hereafter, "App. P."). He stated that the conversations involved the merits of the appeal, what Smith thought was meritorious and what counsel thought was meritorious. (App. P. p. 129). He described his process of "winnowing" down the issues after the review of the trial transcript based upon his experience at that time of handling over one hundred appeals.



(App. P. p. 131).

Concerning the issue he presently complains about, counsel testified:

Alton and I discussed that many times. That was the main thing that he felt went wrong, at least that's what he related to me I felt that there was absolutely no merit in that. I felt then and I do now simply because you can commit a sexual battery simply by engaging in sexual intercourse. There was no requirement that the victim be penetrated. All you have to do is participate in the act of intercourse itself.

(App. P. pp. 131-132). (J.A. p. 5A).

Counsel stated that Smith did not agree with him on this issue, but that in his professional opinion the issue was not a good one to present on appeal. (App. P. p. 132). Counsel Diggs testified that in his experience "you don't want to take an issue like that to the Supreme Court when you know the chances are very, very good it's not going to win

and especially if you feel like there are other meritorious issues in the case, which this case did have." (App. P. p. 134).

Counsel Diggs testified that Smith "is convinced that under the statute this crime is an impossibility." However, counsel testified that the four issues he presented in the appeal "were the issues I thought in October 1983 and they are the issues I feel today we should have pursued." (App. P. pp. 135-136). Counsel testified his disagreement with Smith over presenting the issue "made me careful to insure myself that I was doing the right thing." (App. P. pp. 137-138).

On cross-examination, counsel stated his interpretation of the lack of merit on the "impossibility" claim was

based upon his own review of the sexual conduct statute. (App. P. p. 139). When pressed about the issue, counsel stated the statute changed the common law of rape "to take care of situations exactly like has occurred in this case." (App. P. p. 142). The counsel stated that the statutes are very clear-- "sexual battery means sexual intercourse."

Appellate counsel's decision not to pursue this ground was based upon sound legal, as well as strategic, reasons and not neglect or ignorance. He made informed and deliberate decisions, after review of the transcript, the law, and candid and frank consultation with his client that the four issues he thoroughly briefed, the issue of election, the search of Smith's apartment and recovery



of inculpatory audio tapes and photograph album, and a failure to give a limiting instruction on the photographic evidence, were the stronger issues for appeal. Counsel chose, after careful deliberation, not to dilute this effort through the inclusion of a weaker argument that lacked a sound statutory basis. While his appeal on those issues was not successful, the propriety of his pursuit of those issues has not only gone unchallenged in these proceedings but were asserted in the original Petition as grounds three and four involving the search and seizure. (J.A. p. 68). This Court should not second-guess appellate counsel's reasonably professional decision in raising those claims and rejecting the claim of "impossibility." Jones, supra.

Counsel's performance was informed and not constitutionally deficient. The decisions of the lower court are correct.

In the opinion of the Fourth Circuit, the court concluded that its review was only to determine whether appellate counsel made a reasonable decision in refusing to raise the claim and that it was clear that he did so. Smith, supra, 882 F.2d at 898-899. Here, the issue sought to be raised was solely a matter of a state law definition of sexual battery. The lower courts held that the case the Petitioner relied upon, State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986) was factually distinguishable, failed to define "sexual intercourse" or "anal intercourse" which occurred in Smith's case.

Particularly, it concluded that "faced with a record replete with evidence of sexual intercourse between Miriam and Gary Shull, Diggs reached the reasonable conclusion that the vagueness argument had, at best, a marginal chance of success." Id., 882 F.2d at 899. Such a conclusion given the statutory language of S.C. Code Ann., § 16-3-651-655, (1976), is both legally and factually correct.

CONCLUSION

For the foregoing reasons, we
request that the Petition for Certiorari
be denied.

Respectfully submitted,

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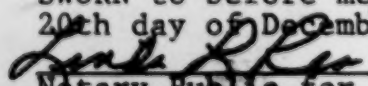
AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief in Opposition on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to W. Gaston Fairey, Esquire, Fairey & Parise, Post Office Box 8443, Columbia, South Carolina 29202. He further certifies that all parties required to be served have been served.

This 20th day of December 1989.


Donald J. Zelenka

SWORN to before me this
20th day of December, 1989.


Notary Public for South Carolina
My Commission Expires: 12-28-90

(LS)

No. 89-834

IN THE
SUPREME COURT OF THE UNITED STATES
November Term, 1989

ALTON B. SMITH,

Petitioner,

versus

THE STATE OF SOUTH CAROLINA,

Respondent.

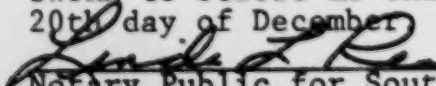
AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Brief in Opposition in the above captioned case by depositing same in the U. S. Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 20th day of December, 1989.


Donald J. Zelenka

SWORN to before me this
20th day of December 1989.

 (LS)
Notary Public for South Carolina

My Commission Expires: 12-28-98